

CHAPTER VI

Legal and Contractual Remedies

6-101 Authority to Debar or Suspend

- (1) *Authority.* After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the Personal Service Contract Review Board, after consultation with the using agency and the Special Assistant Attorney General assigned to the Contract Review Board, shall have authority to debar a person for cause from consideration for award of contracts. The debarment shall be for a period of two years. The same Board, after consultation with the using agency and the Special Assistant Attorney General, shall have authority to suspend a person from consideration for award of contracts if there is probable cause for debarment. The suspension shall not be for a period exceeding three months.
- (2) *Causes for Debarment or Suspension.* The causes for debarment or suspension include the following:
 - (a) conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;
 - (b) conviction under State or Federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a Mississippi contractor;
 - (c) conviction under State or Federal antitrust statutes arising out of the submission of bids or proposals;
 - (d) violation of contract provisions, as set forth below, of a character which is regarded by the Personal Service Contract Review Board to be so serious as to justify debarment action:
 - (i) deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or
 - (ii) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; provided that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment;
 - (e) any other cause the Personal Service Contract Review Board determines to be so serious and compelling as to affect responsibility as a Mississippi contractor, including debarment by another governmental entity for any cause listed herein; and
 - (f) for violation of the ethical standards set forth in Chapter VII (Ethics in Public Contracting).
- (3) *Decision.* The Personal Service Contract Review Board shall issue a written decision to debar or suspend. The decision shall:
 - (a) state the reasons for the action taken; and
 - (b) inform the debarred or suspended person involved of its rights to administrative review as provided in this chapter.

(4) *Notice of Decision.* A copy of the decision under subsection (3) of this section shall be mailed or otherwise furnished immediately to the debarred or suspended person and any other party intervening.

(5) *Finality of Decision.* A decision shall be final and conclusive, unless fraudulent, or the debarred or suspended person commences an action in court.

6-101.01 *Application:*

This Regulation applies to all debarments or suspensions of persons from consideration for award of contracts imposed by the Personal Service Contract Review Board.

6-101.02 *Suspension*

6-101.02.1 *Initiation:*

After consultation with the affected using agency, the Special Assistant Attorney General, and, where practicable, the contractor or prospective contractor who is to be suspended, and upon written determination by the Personal Service Contract Review Board that probable cause exists for debarment as set forth in Section 6-101 (Authority to Debar or Suspend), a contractor or prospective contractor shall be suspended. A notice of suspension, including a copy of such determination, shall be sent to the suspended contractor or prospective contractor. Such notice shall state that:

- (1) the suspension is for the period it takes to complete an investigation into possible debarment including any appeals of a debarment decision but not for a period in excess of three months;
- (2) bids or proposals will not be solicited from the suspended person, and, if they are received, they will not be considered during the period of suspension; and
- (3) if a hearing has not been held, the suspended person may request a hearing in accordance with Section 6-101.04 (Request for Hearing).

6-101.02.2 *Effect of Decision:*

A contractor or prospective contractor is suspended upon issuance of the notice of suspension. The suspension shall remain in effect during any appeals. The suspension may be ended by the Personal Service Contract Review Board but otherwise shall only be ended when the suspension has been in effect for three months or a debarment decision takes effect.

6-101.03 *Initiation of Debarment Action:*

Written notice of the proposed debarment action shall be sent by certified mail, return receipt requested, to the contractor or prospective contractor. This notice shall:

- (1) state that debarment is being considered;
- (2) set forth the reasons for the action;
- (3) state that if the contractor or prospective contractor so requests, a hearing will be held, provided such request is received by the Personal Service Contract Review Board within ten days after the contractor or prospective contractor receives notice of the proposed action.

- (4) state that the contractor or prospective contractor may be represented by counsel.

Such notice shall also be sent to the Special Assistant Attorney General and the affected using agency. The affected Using Agency is that agency that has used the services supplied by the contractor.

6-101.04 *Request for Hearing:*

A contractor or prospective contractor that has been notified of a proposed debarment action may request in writing that a hearing be held. Such request must be received by the Personal Service Contract Review Board within ten days of receipt of notice of the proposed action under Section 6-101.03 (Initiation of Debarment Action). If no request is received within the ten-day period, a final determination may be made as set forth in section 6-101.08 (Determination of Hearing Officer; Final Decision) after consulting with the Special Assistant Attorney General and the affected Using Agency.

6-101.05 *Notice of Hearing:*

If a hearing is requested, the Personal Service Contract Review Board may appoint a hearing officer to conduct the hearing and recommend a final decision. The hearing officer shall send a written notice of the time and place of the hearing. Such notice shall be sent by certified mail, return receipt requested, and shall state the nature and purpose of the proceedings. Copies shall be sent to the Special Assistant Attorney General and the Using Agency.

6-101.06 *Authority of Hearing Officer:*

The hearing officer, in the conduct of the hearing, has the power, among others, to:

- (1) hold informal conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding either by consent of the parties or upon such officer's own motion;
- (2) require parties to state their positions with respect to the various issues in the proceeding;
- (3) require parties to produce for examination those relevant witnesses and documents under their control;
- (4) rule on motions, and other procedural items on matters pending before such officer;
- (5) regulate the course of the hearing and conduct of participants therein;
- (6) receive, rule on, exclude, or limit evidence, and limit lines of questioning or testimony which are irrelevant, immaterial, or unduly repetitious;
- (7) fix time limits for submission of written documents in matters before such officer;
- (8) impose appropriate sanctions against any party or person failing to obey an order under these procedures, which sanctions may include:
 - (a) refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
 - (b) excluding all testimony of an unresponsive or evasive witness; and

- (c) expelling any party or person from further participation in the hearing;
- (9) take official notice of any material fact not appearing in evidence in the record, if such fact is among the traditional matters of judicial notice.

6-101.07 *Hearings Procedures*

- (1) Hearings shall be as informal as may be reasonable and appropriate under the circumstances and in accordance with applicable due process requirements. The weight to be attached to evidence presented in any particular form will be within the discretion of the hearing officer. Stipulations of fact agreed upon by the parties may be regarded and used as evidence at the hearing. The parties may stipulate the testimony that would be given by a witness if the witness were present. The hearing officer may require evidence in addition to that offered by the parties.
- (2) A hearing may be recorded but need not be transcribed except at the request and expense of the contractor or prospective contractor. A record of those present, identification of any written evidence presented, and copies of all written statements and a summary of the hearing shall be sufficient record.
- (3) Opening statements may be made unless a party waives this right.
- (4) All witnesses may be cross-examined.

6-101.08 *Determination of Hearing Officer; Final Decision:*

The hearing officer shall prepare a written determination recommending a course of action. Such determination shall be given to the Personal Service Contract Review Board and the head of a purchasing agency. Copies shall also be sent to the contractor or prospective contractor, the Special Assistant Attorney General, and the affected using agency. The contractor or prospective contractor shall have ten days to file comments upon the hearing officer's determination. The Personal Service Contract Review Board may request oral argument. After consultation with the affected Using Agency and the Special Assistant Attorney General, the Personal Service Contract Review Board shall issue a final decision. Both the hearing officer's determination and the final decision shall recite the evidence relied upon. When debarment is recommended or ordered, the length of the debarment, the reasons for such action, and to what extent affiliates are affected shall be set forth. In addition, the final determination shall inform the debarred person of its rights to judicial review under this chapter of these Regulations.

6-101.09 *Effect of Debarment Decision:*

A debarment decision will take effect upon issuance and receipt by the contractor or prospective contractor. After the debarment decision takes effect, the contractor shall remain debarred until the debarment period specified in the decision expires.

6-101.10 *Maintenance of List of Debarred and Suspended Persons:*

The Personal Service Contract Review Board shall maintain and update a list of debarred and suspended persons. All agencies of the State shall be supplied with this list. The Contract Analyst shall send updates of this list to all agencies of the State as necessary. Such list shall be available to the public upon request.

6-201 Appeal and Review of Personal Service Contract Review Board Decisions

- (1) *Appeal*: Any person receiving an adverse decision, the State, or both may appeal from a decision by the Personal Service Contract Review Board to the designated court or courts of the State.
- (2) *Authorization of Appeal by the State*: No such appeal shall be made by the State unless recommended by the Personal Service Contract Review Board or the head of the purchasing agency involved.

6-202 Discontinuance of Contractor's Appeal:

After notice of an appeal to the Personal Service Contract Review Board has been filed with the Personal Service Contract Review Board, a contractor may not discontinue such appeal without prejudice, except as authorized by the Board.

6-203 Applicability of this Part:

The provisions of this Part apply where it is determined administratively, or upon administrative or judicial review, that a solicitation or award of a contract is in violation of law.

6-203.01 *Determination that Solicitation or Award Violates Law*

6-203.01.1 *Determination:*

A solicitation or award may be in violation of the law due to actions of state employees, bidders, offerors, contractors, or other persons. After consultation with the Special Assistant Attorney General, the Personal Service Contract Review Board or the head of a purchasing agency may determine that a solicitation or contract award is in violation of the provisions of the Mississippi Personal Service Contract Procurement Regulations. After consultation with the Special Assistant Attorney General, the Ethics Commission may determine that a solicitation or award violates Ethics in Public Contracting of the Mississippi Personal Service Contract Procurement Regulations. Any such determination shall be made in writing after an opportunity to be heard is given, and such determination is subject to appropriate appeal. *[The Mississippi Personal Service Contract Review Board may determine that a solicitation or contract award is in violation of the provisions of the Mississippi Personal Service Contract Procurement Regulations.]*

6-203.01.2 *Finding of Bad Faith or Fraud:*

Bad faith or fraud shall not be assumed. Specific findings showing reckless disregard of clearly applicable laws or regulations must support a finding of bad faith. A finding of fraud must be supported by specific findings showing knowing, willful acts in disregard of such laws or regulations.

Section 31-7-57 of the Mississippi Code holds state employees personally liable if they authorize or make a solicitation or award of a contract in violation of law.

6-204 Remedies Prior to an Award:

If prior to award it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be:

- (1) canceled; or
- (2) revised to comply with the law.

6-204.01 *Canceled or Revising Solicitation or Proposed Award to Comply with Law:*

A finding by the Personal Service Contract Review Board, after consultation with the Special Assistant Attorney General, that the solicitation or proposed award is in violation of law will constitute a compelling reason to cancel or revise a solicitation or proposed award. Such cancellation shall be made in accordance with Section 3-301 (Cancellation of Invitations for Bids or Requests for Proposals).

6-205 Remedies After an Award:

If after an award, it is determined that the solicitation or award is in violation of the law then the contract will be canceled in accordance with Section 3-301 (Cancellation of Invitations for Bids or Requests for Proposals).

6-205.01 *Termination:*

Contracts based on awards or solicitations that were in violation of law shall be terminated at no cost to the State, except as may be approved or ratified by the Personal Service Contract Review Board in compliance with State law.

6-205.02 *Effect of Declaring a Contract Null and Void:*

In all cases where a contract is voided, no further payments shall be made under the contract and the State is entitled to recover the greater of:

- (1) the difference between payments made under the contract and the contractor's actual costs up until the contract was voided; or
- (2) the difference between payments under the contract and the value to the State of the services, if obtained under the contract.

The State may, in addition, claim damages under any applicable legal theory.

6-205.03 *Effect of Ratification:*

The State shall be entitled to any damages it can prove under any theory including but not limited to contract and tort regardless of its ratification and affirmation of the contract.